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GENERAL CHARACTERISTICS OF THE GROUNDS FOR CONDITIONAL NON-EXECUTION OF PUNISHMENT IN CRIMINAL LAW

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Annotation. One of the criminal law institutions is probation, which is provided for in Article 71 of the Criminal Code of the Republic of Tajikistan. Since establishing the legal status of the institution of probation, the probationary period was considered an inseparable part of this institution. Therefore, there are different opinions in the legal literature regarding the concept, duration, and beginning and end of the probationary period. From this point of view, the completion of scientific research in this direction is considered urgent. Also, in this article, several reasonable proposals have been made based on the study of scientific literature, ideas, and theories of the scholars of the criminal law and judicial practice of the Republic of Tajikistan, which are aimed at improving the science of criminal law, criminal legislation and eliminating misunderstandings in judicial practice.

Keywords: Institution, Probation, Code, crime, law, probationary period, legislation, judicial practice, convicted, punishment, freedom, military unit, serving sentence, correctional labor.

In case of conditional non-execution of punishment, the court is guided by the grounds stipulated by the criminal legislation. Based on Article 71 of the Criminal Code of the Republic of Tajikistan, when assigning a conditional non-execution of punishment, the court takes into account the nature and degree of public danger of the crime committed, the personality of the perpetrator, as well as mitigating and aggravating circumstances.

The grounds for conditional non-execution of punishment were first established in the Guidelines. Article 26 of the Guidelines first laid the foundations for the introduction of this institution, which are: 1) a crime committed for the first time; 2) if the crime was committed in difficult living conditions; 3) the danger of the convicted person does not require his isolation from society. Also, the nature of conditional non-execution of punishment is defined as the release of the convicted person from serving a real sentence in the form of imprisonment. It can be said that this article defines three grounds for conditional non-execution of punishment.

At the same time, the principles for the implementation of this institution are set out in Art. 36 of the Criminal Code of the USSR of 1922 (committing a crime for the first time, committing a crime in difficult living conditions, the social danger of the convicted person does not require his isolation from society), Art. 36 of the First Fundamentals of Criminal Legislation of the USSR and the Union Republics of 1924 (social danger of the convicted person), Art. 34 of the Criminal Code of the Uzbek SSR since 1926 (a convicted person who is dangerous to society), Art. 47 of the Criminal Code of the Tajik SSR since 1935 increased liability (social danger of the convicted person), in the Criminal Code of the Tajik SSR since 1961 (taking into account the circumstances of the case, the identity of the offender, mitigating and aggravating circumstances).

In the theory of criminal law, there are different points of view on the grounds for applying conditional non-serving of a sentence. According to Starsh A. When assigning a conditional non-serving of a sentence, the main attention is paid not to the social danger of the committed act, as is required when determining the measure of social protection, but only to the danger to society of the offender himself as an individual. This point of view was supported by Professor P.I. Lyublinsky, who added that conditional non-serving of a sentence depends on the subjective characteristics of the person, and not on the severity of the committed crime[1].

V.V. Skibitsky and S.N. Sabanin, on the contrary, have studied this concept and consider the minor degree of public danger of the offender to be the basis for conditional non-execution of punishment[2]. On this issue, S. Kidiralieva noted that the court cannot deny the gravity of the crime committed or determine whether the crime itself poses a danger to society or the person who committed it. The subject cannot be considered separately from the crime he committed[3]. According to this scientist, the crime committed is always evidence that the person poses a certain danger to society, that is, if a person commits a serious or especially serious crime, it becomes clear that the subject of the crime poses a high danger to society, but if he commits a less serious or moderate crime, it can be said that the subject is less dangerous to society.

Other scholars believe that two grounds are necessary for conditional non-execution of a sentence: an objective ground, i.e. a low degree of social danger of the crime committed, and a subjective ground, i.e. a low degree of social danger of the person who committed the crime[4]. V.V. Skibitsky considers this point of view controversial, arguing that “the degree of social danger of the person who committed the crime is

[1] Starsh A. Conditional sentence under the Criminal Code of 1926 // Workers' Court. - 1927. - No. 7. - P. 561.

[2] Skibitsky V.V. Legislation of the Ukrainian SSR on conditional sentencing and the practice of its application: author's abstract. diss. ... candidate of legal sciences. - Kyiv, 1972. - P. 10; Sabanin S.N. Fairness of release from criminal punishment. - Ekaterinburg: Uralsk, state. legal academy jointly with Ekaterinburg higher. school. Ministry of Internal Affairs of the Russian Federation 1993. - P. 117.

[3] Kydyralieva S. Conditional sentence under the criminal law of the Kirghiz SSR. – Frunze, 1968. – P. 52.

[4] Krieger G.A. Conditional sentence and the role of society in its application. - M., 1963. - P. 20; Sarkisova E.A. Educational role of conditional sentence. - Minsk, 1971. - P. 29; Haverov G.S. Problems of punishment of juvenile offenders. - Irkutsk. 1986. - P. 163.

determined by the nature and degree of danger of the crime committed"[5]. According to V.A. Lomako, the definition of such a limitation complicates the solution of the issue of conditional non-execution of a sentence[6]. In our opinion, the position of these scholars cannot be accepted, since the actual grounds for conditional non-execution of punishment, namely the low degree of social danger of the crime committed, are not sufficiently confirmed in judicial practice. The materials of court cases that we studied indicate that for 20%[7] of serious crimes the punishment was conditional.

Further, in the theory of criminal law, several new points of view arose regarding the grounds for the application of conditional non-servicing of punishment, the representatives of which argued that the absence of mitigating circumstances specified in the law is not sufficient for conditional non-servicing of punishment, but essential mitigating circumstances or exceptional circumstances are necessary for its application. For example, M.N. Schneider, A.D. Solovyov and others support this point of view[8].

According to M.D. Shargorodsky, conditional non-execution of a sentence does not require the presence of special mitigating circumstances; these may be circumstances provided for in Article 48 of the Criminal Code of the RSFSR and the corresponding articles of the criminal codes of the union republics[9]. According to V.A. Lomako, none of the mitigating circumstances, either individually or in their totality, create a clear picture of the crime committed, the personality of the criminal, his social danger, and therefore cannot serve as grounds for conditional non-execution of a sentence[10].

Analyzing the above opinions, we can conclude that they cannot be fully accepted. Since, if the application of conditional non-serving of a sentence is possible in the presence of special mitigating circumstances, then it makes sense that for the application of the institution of conditional non-serving of a sentence, in addition to the mitigating circumstances specified in Art. 61 of the Criminal Code of the Republic of Tajikistan, new, extremely mitigating circumstances are required.

In the legal literature, there is also an opinion that the basis for assigning a conditional sentence is the social danger of the actions or personality of the convicted person, indicating the impossibility of actually serving the sentence. According to Sharipov T.Sh. in this regard, there is a subjectivation of the very concept of "basis", defining it as "the court's conclusion on the possibility of correcting the convicted person, without

[5] Skibitsky V.V. Legislation of the Ukrainian SSR on conditional sentence and practices of its application: author's abstract. dis. … candidate of legal sciences. – Kyiv, 1972. − P. 10-11; Lomako V.A. Application of criminal conviction. – Kharkov, 1976. – P. 29.

[6] Lomako V. A. Application of criminal conviction. – Kharkov, 1976. – P. 29.

[7] Reference book of the Supreme Court of the Republic of Tajikistan "On the study and consolidation of judicial practice on cases related to the "Institute of Conditional Non-Application of Punishment"", considered by the courts of the republic from 2016 to 2021.

[8] Schneider M.N. Naznachenie nakazaniya po sovetskomu criminal law. - M., 1957. - S. 97; Soloviev A.D. Voprosy application of punishment in Soviet criminal law. - M., 1958. - S. 147; Criminal law of Russia. General part: Textbook / Pod ed. F.R. Sundurova, I.A. Tarkhanova. - 2nd ed., pererab. and dop. - M., 2016. - S. 650.

[9] Shargorodsky M.D. Punishment under Soviet criminal law. – M., 1958, – P. 157-158.

[10] Lomako V.A. Application of conditional sentence. – Kharkov: Higher. school. 1976. – P. 28.

actually serving one of the five types of punishment provided for by law"[11]. However, not only the court's conclusion, but also the existing objective circumstances requiring a characterization of the crime itself and the person who committed it, determine the further actions of the court in terms of conditional non-execution of the sentence. In support of this opinion, I would like to emphasize that in reality the right to apply or not to apply conditional non-execution of punishment depends on the will of the court, but the criminal legislation itself provides for what factors should be taken into account as grounds for its application.

Yakubov A.S. and Abduganiev I.A. provide the following grounds for not applying a suspended sentence: 1) the person who committed the crime does not pose a significant danger to society or has not committed a serious crime; 2) the person has not previously committed an intentional crime and has not been sentenced to imprisonment; 3) the court has imposed a punishment in the form of imprisonment, correctional labor, detention in a disciplinary military unit, or restrictions on military service[12].

In our opinion, conditional non-execution of punishment is allowed only if, according to the court's conclusion, there is no longer any need for further actual serving of the appointed sentence. When assigning a conditional sentence, the court takes into account the nature and degree of public danger of the crime committed, the personality of the offender, as well as mitigating and aggravating circumstances to confirm its decision.

The judicial practice of the Republic of Tajikistan shows that the courts take into account a number of circumstances as grounds for not applying a conditional sentence. For example, by the verdict of the Firdavsi District Court of Dushanbe on May 30, 2017, citizen M.A.M., in accordance with paragraph "a", part 3 of Article 237 of the Criminal Code of the Republic of Tajikistan, he was found guilty and sentenced to 5 years of imprisonment, with the possibility of serving the sentence in a strict regime penal colony, with the possibility of imposing a fine in accordance with Article 71 of the Criminal Code of the Republic of Tajikistan, a sentence of imprisonment was not conditionally applied to M.A.M., he was given a probationary period of 1 year[13].

An examination of the materials of this criminal case showed that the following mitigating circumstances were the basis for the conditional non-execution of the sentence: information about the defendant's personality, whether the crime was committed for the first time, the defendant's youth, his status as a student, his admission of guilt, compensation for the damage caused, the absence of claims from the victim against the defendant, as well as his impeccable reputation, and not his education.

[11] Sharipov T.Sh. Conditional exemption from criminal liability: problems of theory, legislation and practice: monograph. - Dushanbe, 2003. – P. 69.

[12] Criminal Code of the Republic of Uzbekistan. Scientific and practical commentary / Edited by A.S. Yakubov. – Tashkent, 1996. – P. 108.

[13] Criminal case No. 1-87/17 // Archive of the Firdavsi district court of Dushanbe.

In one case, the question arises as to what purpose the judicial assessment should be aimed at when not applying a conditional sentence. It should be noted that the provisions of the Fundamentals of Legislation of 1958 and the criminal codes of the union republics (1960-1962) did not fully regulate this issue.

Thus, Part 1 of Article 38 of the Fundamentals of Legislation of 1958 (Part 1, Article 43 of the Criminal Code of the Tajik SSR of 1961) contained provisions on the inexpediency of serving the sentence assigned to the offender. However, not in Article 38 of the 1958 Constitution and not in Art. 43 of the Criminal Procedure Code of the Tajik SSR of 1961, criteria for determining the inappropriateness of serving a real sentence were not provided.

This issue was not resolved in the Model Criminal Code of the CIS Member States of 1996 and the Criminal Code of the Republic of Tajikistan of 1998. But this problem was resolved in paragraph 2 of the Resolution of the Plenum of the Supreme Court of the former USSR "On judicial practice in the application of suspended sentences" of March 4, 1961, with amendments and additions of April 26, 1984 and Art. 78 of the Criminal Code of the Republic of Belarus. This resolution established that when applying a suspended sentence, it is necessary to take into account both the correction and re-education of the convicted person and the prevention of the commission of new crimes by the convicted person and other persons[14].

According to paragraph 1 of Article 78 of the Criminal Code of the Republic of Belarus, the court, taking into account the nature and degree of public danger of the crime committed, the personality of the perpetrator and other circumstances of the case, comes to the conclusion that the goal of criminal liability can be achieved without actually serving the appointed sentence. Based on this norm, the goals of criminal liability are: correction of the person who committed the crime, prevention of the commission of new crimes by both the convicted person and other persons, restoration of social justice (Article 43, parts 1 and 2 of the Criminal Code of the Republic of Belarus)[15].

In this regard, we believe that when adopting a new version of the Criminal Code of the Republic of Tajikistan, the provisions contained in the Resolution of the Plenum of the Supreme Court of the former USSR and Part 1 of Article 78 of the Criminal Code of the Republic of Belarus should be taken into account. The authors of the "Theoretical Model" believe that the possibility of conditional application of punishment depending on the court's conclusion would be appropriate for achieving all the goals of criminal punishment, without its actual serving[16].

Thus, one of the main issues in determining the conditional non-execution of punishment is the determination of the grounds for the application of this institution. In our opinion, the grounds for the conditional non-serving of punishment are understood to be a set of circumstances, including the nature and degree of public danger of the crime committed, the personality of the perpetrator, as well as mitigating

[14] Collection of resolutions of the Plenum of the Supreme Court of the USSR. 1924-1986. – M., 1987. – P. 489.
[15] Criminal Code of the Republic of Belarus // – St. Petersburg: Legal Center Press, 2001. – 474 p.
[16] Theoretical model of the criminal code (General part). – M., 1985. – P. 56.

and aggravating circumstances that contribute to the court's conclusion about the achievement of the goals of criminal punishment without its actual serving.

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